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IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 301

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,

Petitioners,

vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Seventh Circuit
AND BRIEF IN SUPPORT THEREOF.

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August 13, 1942.

MC CORNICK AND HENDERSON, INC., CHICAGO

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vs.

FLORENCE G. HICKS and N. E. CATLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES of the SUPREME COURT of the UNITED STATES:

Your petitioners, Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, the United States Trust Company of New York, as Trustee under the General Gold Bond Mortgage of the Chicago and North Western Railway Company, and James E. Lockwood, Jr., file this petition to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on April 8, 1942 (R. 226). Rehearing was denied on June 9, 1942 (R. 227).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case was instituted on December 4, 1937, when the respondents filed a petition in the Chicago and North Western Railway Company Reorganization Proceedings, pending in the United States District Court for the Northern District of Illinois, Eastern Division, to challenge the Railway Trustee's title to, and use of, a strip of land located a short distance north of the City of Rockford, Illinois (R. 2-11), which strip was acquired by deed in 1863 (R. 98-100), and for many years has been used for railroad right of way. Portions of this strip of land, on each side of the railroad track there in use, were leased, in 1937, to petitioner Lockwood as a site for a bulk oil station and retail filling station (R. 117-26). Due to the execution and delivery by the Railway Trustee of this lease to Lockwood, the respondents precipitated the present controversy (R. 4-7).

The petition was amended twice (R. 19, 58). The District Court referred the entire matter to a Special Master (R. 25). After taking proof, hearing arguments and examining briefs, the Special Master filed a report, including therein an opinion and findings of fact and conclusions of law, holding that the respondents were not entitled to any of the relief sought (R. 151-185). Exceptions to the Special Master's report were filed by the respondents (R. 185-192). After oral argument, these exceptions were overruled by the District Court and a decree was entered confirming and adopting the report and dismissing the respondents' petition (R. 193-195). The respondents appealed the case to the United States Circuit Court of Appeals and, on April 3, 1940, that Court handed down an opinion affirming the District Court (R. 210-16). Thereafter, the respondents filed a petition for rehearing (R. 217). On January 3, 1941, the

Circuit Court of Appeals entered an order withdrawing its opinion (R. 217). The court handed down a second opinion on April 8, 1942, and, this time, reversed and remanded the case to the District Court (R. 218-25). The petitioners then filed a petition for rehearing (R. 227), and on June 9, 1942, rehearing was denied (R. 227).

The deed here in question is dated June 19, 1863, and by it Mary A. Camp and James S. Camp, in consideration of one hundred dollars, conveyed to the Trustee of the Kenosha Rockford and Rock Island Rail Road Company (predecessor of the Chicago and North Western Railway Company) the strip of land, fee title to which is now claimed by both the petitioner Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, and the respondents. The strip contains one and fifteen hundredths acres (R. 98).

Mary A. Camp was the owner of the land and James S. Camp joined in the conveyance as her husband (R. 99-100). The grantors remised, released, sold, conveyed and quitclaimed to the grantee "or his successor forever" all of their right, title, interest, claim and demand in the land described as follows (R. 98):

> "A strip of land fifty feet in width on each side of the center line of the track of the Kenosha Rockford and Rock Island Rail Road as the same is now laid through a part of the southeast fractional quarter of Section thirteen (13), Township forty-four (44) North Range one (1) east of the third principal meridian. Said Center of the track bounded as follows: Commencing nineteen chains and fifty-seven links (1957) West of the Northeast corner of said Quarter section, thence in a southwesterly direction on a curve with a radius of Five thousand seven hundred thirty feet a distance of five hundred two feet (502), containing one and fifteen hundredths acres (1.15/100)."

The controversy in this case has arisen because of language contained in the *habendum* clause of the deed (R.98-99). This clause reads as follows:

> "To have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining and all the estate right title and interest and claim whatever of the said party of the first part either in law or in equity to the only proper use, benefit and behoof of the said party of the second part and his successors forever for railroad purposes only. And the said party of the first part for themselves and their heirs, executors and administrators doth covenant promise and agree to and with the said party of the second part his successors that they have not made, done, committed executed or suffered any act or acts, thing or things whatsoever whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now or at any time hereafter shall or may be impeached charged or incumbered in any manner of way whatsoever."

(For the convenience of the Court, a copy of the deed is set forth in Appendix A.)

On November 20, 1865, Mary A. Camp and James S. Camp, in consideration of $1400.00, deeded to Lysander C. Jacoby a 71-acre tract of land, including within the description the strip referred to above but excluding from the warranty "certain rights of the Rail Road in one 15/100 acres thereof" (R. 102).

Lysander C. Jacoby and Mary A. Jacoby, on December 27, 1870, conveyed to the Chicago and North Western Railway Company part of the strip of land previously conveyed by the Camp deed and also conveyed an additional strip of land lying to the south of the original parcel, plus a small triangular plot adjoining the northeast corner of the original strip (R. 103-6, 135). Although the respondents

have contended that this second deed superseded the Camp deed, neither the Special Master, the District Court nor the Circuit Court of Appeals have agreed with this contention (R. 184-5; 194 and 214-15).

It is admitted by counsel for the respondents that if, by virtue of the deeds, the Railway Company acquired more than an easement in the land, the respondents are not the proper parties to maintain the proceeding, as they claim as grantees and not as heirs of the original grantors (R. 37, 171-2).

The lease to petitioner Lockwood is on the standard form used by the Land Department of the Railway Company (R. 65). The term is five years, but it is provided that either party may at any time terminate the lease by giving thirty days' notice of intention to do so (R. 124). It was approved by the Illinois Commerce Commission (R. 126).

A map (R. 135) which shows, among other things, the location of the property conveyed by the Camp and Jacoby deeds in relation to a highway intersection at the time the map was made in 1938, was received in evidence as Trustee's Exhibit A (R. 60-61). In accordance with the findings of the Special Master (R. 183-85), it is correct to state also, that the strips of land which have been leased to Lockwood for a bulk oil station and retail filling station are accurately shown in black outline on this map.

In the Circuit Court of Appeals' opinion of April 3, 1940 (R. 210-16), the court determined that the Camp deed conveyed fee title; that the Jacoby deed was void to the extent that it overlapped the Camp deed; that there had been no abandonment by the railroad or its trustee; and that the leased premises were located wholly upon the Camp deed property. The court's opinion of April 8, 1942 (R. 218-25), differs from the first opinion in that it holds

that the Camp deed did not convey the fee but only an easement and also holds that the lease to Lockwood is not a proper use of the servient land.

OPINION BELOW.

The Circuit Court of Appeals' opinion of April 8, 1942 (rehearing denied June 9, 1942) is reported in 127 Fed. (2d) 1001 (R. 218-25). Its previous opinion is in the record (R. 217).

JURISDICTION.

The judgment of the Circuit Court of Appeals here sought to be reviewed was entered on April 8, 1942, and became final on June 9, 1942, when the petition for rehearing was denied (R. 227). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347(a)).

QUESTIONS PRESENTED.

1. Under Illinois law, did the Camp deed convey only a right of way easement, or did it convey a greater estate?

2. Even if the deed conveyed only a right of way easement, under Illinois law, is the temporary leasing of part of the property conveyed for a gasoline filling station a proper use?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals in the opinion here sought to be reviewed has decided important questions of Illinois law in a way in conflict with the applicable Illinois decisions, and has reached a result contrary to its own previous conclusion in this case.

I.

The Circuit Court of Appeals should have held that the Camp deed conveyed fee title and in support of this proposition petitioners show to this Court the following:

(a) The Circuit Court of Appeals erred in relying primarily upon *Tallman* v. *Eastern Illinois & Peoria Railroad Co.*, Ill. Sup. March 17, 1942, 41 N. E. (2d) 537, and in according to that case wholly unwarranted significance.

(b) The court erred in holding that the *Tallman* case made unnecessary any discussion of the Illinois Supreme Court's decisions in *Downen* v. *Rayburn*, 214 Ill. 342, *Tinker* v. *Forbes*, 136 Ill. 221, and *Board of Supervisors* v. *Patterson*, 56 Ill. 111, which are authority for the proposition that the Camp deed conveyed the fee.

(c) The court erred in failing to decide that, under the Illinois decisions, particularly, *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516, the respondents herein, in order to prevail, should have proved, but did not prove, that the language of the deed, the attendant circumstances, and the objects in view, as well as the interpretation of the parties, disclosed an intention to grant an easement rather than the fee.

II.

The Circuit Court of Appeals should have held that the lease and use of the property in question for a filling station is proper and in holding such lease and use improper, the court erred in the following respects:

(a) It founded its opinion on a plain *obiter dictum* in an Illinois decision, in the face of the rule in that State that an opinion of its Supreme Court is authority only for what is actually decided.